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Answer of Respondents

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Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 17, Original.

EX PARTE: IN THE MATTER OF THEODORE QUEEN, THOMAS S. QUEEN, ET AL., PETITIONERS.

ANSWER OF THE RESPONDENTS.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1-28-01

IN THE

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ANSWER OF THE RESPONDENTS.

For answer to the rule served upon them in the above-entitled proceedings, to show cause why a mandamus should not be awarded, as prayed in the petition therein, these respondents say:

That on the 5th day of June, 1893, pursuant to the powers vested in them by the act of Congress, approved February 9, 1893, creating a Court of Appeals in the District of Columbia, they promulgated certain rules governing practice in that court, one of which was as follows:

No. XIII.

1. All cases, the records or transcripts of which shall be received by the clerk of this court on or before the tenth day of the term, shall be considered for trial in the course of that term; but such cases shall be placed on the docket in the

order of time in which the records or transcripts shall be received, and if received after the sixth day of the term either party shall be entitled to a continuance; but when an appeal is entered in the court below which shall operate as a supersedeas of the judgment, order, or decree appealed from, or when there has been a special order or appeal bond for the stay or supersedeas of the judgment, decree, or order appealed from, in all such cases it shall be the duty of the appellant, within forty days from the time of the appeal entered and perfected in the court below (unless such time, for special and sufficient cause, be extended by the court below or the judge thereof by whom the judgment, decree, or order may have been rendered, such time to be definite and fixed), to produce and file with the clerk of this court a transcript of the record of said cause; and if he shall fail to file the transcript within the time limited therefor the appellee shall be allowed to file a copy or transcript of the record with the clerk of this court, and the cause shall stand for trial in the like manner as if the transcript had been filed by the appellant in due time; or the said appellee may, on producing a certificate from the clerk of the court below, stating the cause, and that an appeal has been entered, and the date thereof, and that the judgment, decree, or order appealed from is stayed or superseded by bond or otherwise, have the said appeal docketed and dismissed; or, *in any case*, the appellee may, after the time limited for filing the transcript in this court by the appellant and the lapse of the second term of this court succeeding the entry of the appeal in the court below, upon producing a certificate showing the entry of appeal and the date thereof, have said appeal docketed and dismissed, and in no case shall the appellant be entitled to docket the case and file the record after said appeal shall have been docketed and dismissed under this rule, unless by special order of the court, upon satisfactory reason shown.

On the 29th day of September, 1894, under the act above referred to and an act amendatory thereof, approved July 30, 1894, they amended said rules in several respects, and among the amended rules then promulgated was one, Rule XIV, which was the same as the rule of which the above is a copy, except that the last clause was amended so as to read as follows:

"or, *in any and all cases*, the appellee may, after the time limited for filing the transcript in this court by the appellant and his or her default in respect thereto, upon producing a certificate showing the entry of appeal and the date thereof, have said appeal docketed and dismissed; and in no case shall the appellant be entitled to docket the case and file the record after said appeal shall have been docketed and dismissed under this rule, unless by special order of the court upon satisfactory reason shown."

* * * * * * *

Said rule has ever since remained in force as so amended in 1894, it being now Rule XV of the court. Among the other rules so adopted in 1894, and which have remained in force ever since, are the following:

[redacted].

1. No motion to dismiss an appeal shall be heard, except upon suggestion of the court, unless previous notice thereof has been given to the adverse party, or his attorney of record, at least two days before the case is liable to be called for argument; and all such motions shall be made in writing, stating briefly the grounds thereof; this rule not to apply to motions to docket and dismiss under preceding rule.

2. In order to prevent the abuse of the right of appeal, and to avoid vexatious delays, there may be united with a motion to dismiss the appeal a motion to affirm on the ground that, although the record may show that this court

has jurisdiction of the case, it is manifest that the appeal was taken for delay only, or that the question on which the jurisdiction and right of review depends is so manifestly frivolous as not to require further argument; and in all cases of such motions there shall be filed a brief statement of the points or questions decided by the court below, and the ground upon which the motion is made.

3. In all cases of the dismissal of any appeal in this court it shall be the duty of the clerk of this court to issue a certificate to the court below, informing that court of the proceedings of this court in respect to such appeal, so that further proceedings may be had in such lower court as law and justice may require.

Rule XXVI.

That wherever days are mentioned in the foregoing rules as limitation of time, they shall be construed to exclude Sundays and legal holidays.

Prior to the amendment of said rules in 1894, it came to the knowledge of the respondents that some question had been made as to whether the time limited by said original rule XIII for the filing of transcripts on appeal in the Court of Appeals applied to cases in which the judgment, order, or decree appealed from was not superseded, and it was for the purpose of removing any doubt on that subject that the rule was amended by striking out the word "case" and inserting in lieu thereof the words "and all cases." It was the intention of the respondents by said rule, both when it was first adopted and when it was so amended, in all cases, whether there had been a supersedeas or not, to fix a period of time within which the transcript should be filed in the Court of Appeals (subject to the authority given by the rule itself, to the court below or a judge thereof, to extend the time).

Otherwise there would have been no provision at all for cases in which there should be no supersedeas.

The rule as so understood and construed by the respondents has been enforced in every case in which it has been brought to the attention of the respondents. So far as they know, no case has arisen since September 29, 1894, in which the transcript has not been filed within forty days from the time of the appeal entered and perfected in the court below, except where the time has been extended in accordance with the rule, by an order made by a judge of the court below before the expiration of the time limited by the rule or by a previous order. In the case of The District of Columbia *vs.* Humphrey, 11 App. D. C., 68, the appeal was dismissed solely because the transcript was not filed in the Court of Appeals within the forty days prescribed by the rule in question, and without reference to whether the appeal operated as a supersedeas. The opinion of the Court of Appeals in that case was published among the regular reports of that court in 1898.

As to the averments of the petition in this case regarding proceedings in the court below, in the suit in that court involving the validity of the will of Marcellina Jarboe, the respondents have no knowledge, except as they are informed by the transcript filed in the Court of Appeals in that case by the petitioners in the present proceeding. That transcript contains, among other things, the following papers:

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA, HOLDING A SPECIAL TERM FOR ORPHANS' COURT BUSINESS.

In the Matter of the Estate of MARCELLINA JARBOE, Deceased. No. 8851, Adm. Doc. 25.

Upon application of the caveators, defendants, the justice presiding at the trial of the issues herein hereby grants the following certificate of facts that occurred during said trial:

The caveators, pursuant to a notice in the record (p. 22), called upon the caveatees during the said trial to produce in open court a will of said decedent dated in 1891. Thereupon counsel for the caveatees stated in open court that they could not do so because they knew of no such paper, nor did the caveatees know of any such paper. Caveators then called to the stand successively George J. Butt, Theodore Queen, and Anna Bagnam and offered to prove by said witnesses, among other things, by declarations made to them by said Marcellina Jarboe and others, that a will was executed by decedent in the fall of 1891, at the house of Samuel Byer, and certain declarations of Samuel Byer, deceased, made to said witnesses, Butt, Bagnam, and Byer, and certain other declarations made to the witness Queen by his sister, said Marcellina Jarboe, as to what a portion of the contents of said supposed will were. Counsel for the caveatees objected to the testimony offered as aforesaid, and the court sustained the objection. Questions intending to elicit such information were propounded to said witnesses by counsel for caveators, but the witnesses were severally directed by the court not to answer the same, on the ground that the evidence offered was purely hearsay and inadmissible in evidence. No exception to such rulings or any of them was taken at the trial, but the objections to such

rulings were embodied in the motion for a new trial and considered by the court upon the argument thereof.

CHAS. C. COLE, *Justice.*

Endorsement: Certificate of Hon. C. C. Cole, justice, as to certain matters accruing at trial of the issues in above-entitled cause. Filed July 2, 1900.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA, HOLDING A SPECIAL TERM FOR ORPHANS' COURT BUSINESS.

In re Estate of MARCELLINA JARBOE, Deceased. No. 8851.

Now come the caveators and move the court, now for then, to enlarge the time for filing the transcript in this cause in the Court of Appeals.

J. H. ADRIAANS,
Attorney for Caveators.

To Messrs. WORTHINGTON, HEALD, and FRAILEY,
Attorneys for Caveatees:

Take notice hereby that on Monday, the 17th day of September, A. D. 1900, at one p. m., I will present the above motion to the justice holding the orphans' court for action.

J. H. ADRIAANS,
Attorney for Caveators.

Service of a copy of the above accepted this 13th day of September, 1900.

CHARLES L. FRAILEY,
Per LEE.

Endorsement: "Motion to enlarge time to file transcript in Court Appeals." Filed September 15, 1900.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA, HOLDING A SPECIAL TERM FOR ORPHANS' COURT BUSINESS.

In re Estate of MARCELLINA JARBOE. No. 8851. Probate.

Upon application of the caveators, the time for filing the transcript of the record herein in the Court of Appeals is hereby extended, this 2d day of July, 1900, forty days from the expiration of time limited by the rules of said court.

CHAS. C. COLE, *Justice.*

Endorsement: Order extending time to file transcript of record in Court of Appeals. Filed July 2, 1900.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA, HOLDING A SPECIAL TERM FOR ORPHANS' COURT BUSINESS.

In re Estate of MARCELLINA JARBOE. No. 8851.

Affidavit in Support of Motion to Extend Time to File Transcript.

John H. Adriaans, being duly sworn, deposes and says that he is the attorney for the caveators herein; that an appeal was noted on the 14th day of May, 1900, and an appeal bond for costs was approved and filed May 17, 1900; that the bill of exceptions was filed June 30, 1900, and an order was passed July 2, 1900, extending the time for filing the transcript in the Court of Appeals forty days from the expiration of the time limited by the rules of said court; that thereafter affiant sought diligently to procure sufficient funds among the caveators to pay for preparing the transcript and for docketing and printing the same. The effort to obtain

this money proved fruitless, and one of the heirs made an affidavit in support of a motion, filed July 18, 1900, to charge these costs upon the estate. This motion was duly served on John C. Heald, Esq., of the firm of caveatees' counsel, but he stated he would not be in town on the return day of the motion. Affiant then saw the executor and collector of the estate, Wm. M. Lewin, and he suggested that affiant should write to Charles L. Frailey, of the same firm, in regard thereto. Affiant accordingly wrote to said Frailey and received a reply thereto, dated July 31, 1900, requesting affiant to withhold the presentation of said motion until his return, about August 15, 1900. Upon the return of said Frailey, affiant's associate counsel, Walter D. Davidge, Esq., was away from the city. When, finally, all the said attorneys met in the orphans' court for the disposition of said motion Justice Clabaugh, then presiding, stated that he was in a hurry to catch a train and could not hear this motion. Meanwhile the time limited by the order of July 2, 1900, to file the transcript expired on August 20, 1900, and by an oversight and mistake of affiant the motion to still further extend the time was not made before August 20. Affiant is now advised that friends of the caveators have come to their assistance to raise the requisite funds, and that the motion to charge the costs upon the estate will not be pressed by them if the court will provide them a reasonable time within which to file said transcript.

JOHN H. ADRIAANS.

Sworn to and subscribed before me this 20th day of September, 1900.

JOHN R. ROUZER,
Acting Register of Wills.

Endorsement: "Affidavit in support of motion to extend time for filing transcript." Filed September 20, 1900.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA, HOLDING A SPECIAL TERM FOR ORPHANS' COURT BUSINESS.

In re The Estate of MARCELLINA JARBOE, Deceased. No. 8851.

On motion of the caveators herein, supported by affidavit, it is, this 21st day of September, 1900, ordered that the time within which to file the transcript of record on appeal in the Court of Appeals, heretofore extended, be, and it is hereby, further extended, now for then, from the expiration of said last extension to and until the 15th day of October, 1900

CHAS. C. COLE, *J.*

Endorsement: "Order." Filed September 21, 1900.

Upon consideration of these papers, it seemed to the respondents that the counsel for the petitioners himself understood and acted upon the construction of said rule given to it by the respondents and admitted that the failure to comply with it in this case was the result of his own neglect.

In conclusion, the respondents respectfully submit that the order referred to in the petition in this case, which was made by a judge in the court below on the 21st day of September, 1900, was of no effect, and that they were without jurisdiction to entertain said appeal, and were compelled to grant the motion that was made to dismiss it.

R. H. ALVEY,
Chief Justice.

M. F. MORRIS,
Associate Justice, Court of Appeals.

SETH SHEPARD,
Associate Justice, Court of Appeals D. C.